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BREXIT and the Future of UK Environmental Law

Abstract

The UK's decision to leave the EU will have major consequences for environmental law. EU law is integrated into the UK's laws in many ways that will be difficult to disentangle and a continuity of laws provision seems desirable in order to avoid gaps in the law appearing. The internal effect of devolution is that most environmental matters will in future be the responsibility the devolved administrations. The UK's freedom of action will continue to be restrained by obligations in international law, including those establishing a new relationship with the EU. Environmental law in the UK has changed greatly during the four decades of its membership of the EU and most of the innovations introduced through the EU are likely to be retained, although there may be a wish to restore more discretion over the outcomes to be achieved as opposed to having strict obligations to satisfy targets and standards. In structural terms the biggest changes are likely to be the loss of the stability provided by the slow processes of making and changing EU law and the loss of means to call the UK and devolved governments to account over their performance in meeting their environmental commitments.

Keywords

Environmental Law; UK and EU; Withdrawal from EU; Brexit; International Obligations; Devolution; Government accountability

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In June 2016 the result of a referendum in the United Kingdom (UK) was in favour of leaving the European Union (EU). The only certain consequence of that vote is uncertainty, with a change of Prime Minister, differing views on the pace and details of the withdrawal negotiations, ongoing debates on the nature on the UK's future relationships with the EU and other states and discussion of various scenarios that might lead to the break-up of the UK itself¹ (and indeed speculation on ways of reversing or revisiting the decision to withdraw). At the time of writing, shortly after the referendum, it would be foolish indeed to predict what the position will be by the time this piece is being read. Nevertheless, the changes brought about by 'Brexit'² will be profound, particularly in areas such as environmental law where the EU has done so much to shape the transformation of the law over the four decades since the UK joined the EU.³ This paper gives a brief overview of some of the challenges that lie ahead, considering the structural issue of how UK and EU

¹ In particular, the fact that Scotland clearly voted to remain within the EU is seen as a possible trigger for a second referendum on Scottish independence, following the one in September 2014 which decided against separation from the UK, but with 45% of those voting favouring independence.

² The term 'Brexit' refers to Britain 'exiting' the EU.

³ The United Kingdom joined the European Union on 1 January 1973; Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community[1972] OJ L73/5, art. 2 (following a referendum after the treaty was agreed, Norway decided not to join and has remained outside the EU).

laws are entwined, the international dimension and possible implications for the substance of environmental law.

The process for a Member State to leave the EU is laid out in article 50 of the Treaty on European Union and calls for the EU to ‘negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union’. Withdrawal takes effect in accordance with that agreement, or two years after the submission of the notification of intention to withdraw (unless an extension is unanimously agreed). The timing of that formal notification, the tone of the negotiations and the possible future relationships are all uncertain at the time of writing. What follows will therefore concentrate on some of the known consequences of withdrawal and reflect on how membership of the EU has affected the UK’s environmental law.

Legal Structures

At a simplistic level achieving Brexit may seem straightforward. EU law has authority within the UK by virtue of the European Communities Act 1972 and once the UK Parliament repeals that Act, the authority of all EU law disappears. Unfortunately it is not as simple as that. It is in the very nature of the EU legal system that the provisions of EU law are not distinct from domestic law but embedded in it and after four decades of membership the EU inheritance is deeply integrated into UK law.

There are some cases where EU law does stand alone, with the content of the law relying exclusively on Treaty provisions⁴ and directly applicable EU Regulations⁵, but even here there are usually some related measures in UK law to assist enforcement or authorise public bodies to support the relevant activity. More commonly, and especially in the environmental field where Directives⁶ have been the leading mechanism used make the law, the requirements of EU law have been given full legal form and effect through UK legislation. Thus the legal protection required for Special Areas of Conservation under the Habitats Directive⁷ is achieved in practice through legislation made by the relevant UK authorities.⁸ The position is complicated by two other features. Firstly, the UK legislation

⁴ Under EU law certain provisions of the Treaties are regarded as having ‘direct effects in the legal relations between the Member States and their citizens’ so that Treaty provisions can be relied on directly as creating rights and obligations which will be recognised by national courts, without any need for further domestic measures to implement or specifically adopt them; *Van Gend en Loos v Nederlandse Administratie der Belastingen* (case 26/62).

⁵ Under the Treaty on the Functioning of the European Union, an EU Regulation is ‘binding in its entirety and directly applicable in all Member States’ (art.288), which means that it has the same legal force as legislation made at the national authorities.

⁶ In contrast to the position with Regulations, an EU Directive is ‘binding as to the result to be achieved ... but shall leave to the national authorities the choice of form of methods’ (ibid.), requiring legislation at national level to implement the measure fully, giving it full legal effect in the national legal system, whether by amending existing laws or introducing new ones so that the requirements of the Directive are fully satisfied; enforcement proceedings can be taken against a State which has not fully implemented a Directive within the prescribed time period and some provisions of Directives can be given ‘direct effect’ where the State is in default, allowing individuals to claim against the State rights which they would have had if the State had not failed in its obligation to establish such rights in its national law (*Van Duyn v Home Office* (case 41/74)).

⁷ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7, art.6.

⁸ Conservation (Natural Habitats, etc.) Regulations 1994, SI 1994/2716, Part 4; Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995, SR 1995/380, Part 4; Conservation of Habitats and Species Regulations 2010/490, Part 6.

may not be self-contained but make express reference to EU law on key points, eg there is no definition of ‘waste’ in the key UK legislation on this topic, but rather a reference to the definition in EU law.⁹ Secondly, EU initiatives may prompt UK legislation which does more than simply what is necessary to implement the EU law, eg the Environmental Assessment (Scotland) Act 2005 which applies strategic environmental assessments to plans well beyond the categories specified in EU law,¹⁰ and the transformation of water law in Scotland¹¹ which incorporated the requirements of the Water Framework Directive¹² but did much more than that.

What this means is that there is no easy way of identifying and isolating the EU elements in the law applying within the UK. A simple measure saying that all EU laws no longer have legal force would not eliminate all of the EU legacy since measures wholly embedded in UK legislation would continue unaffected. It would also leave large chunks of UK law with major holes which would in effect prevent them from operating and open up a legal vacuum in areas where there would be no valid legal rules at all.¹³ The options therefore seem to be twofold. One is to review all of the laws, identify all of the provisions directly or indirectly linked to EU law, decide whether these should be removed, kept in amended form or continued in force, and then replace every provision that is desired with a properly made domestic one. It seems wholly unrealistic that that could be achieved before ‘Brexit Day’. The alternative is to provide for the continuing effect of all the law in force on Brexit Day, including measures in EU legislation, whether free-standing or incorporated directly or by reference into domestic laws. This is what happened in Ireland when it broke away from the United Kingdom.¹⁴ Some headline measures might be identified as disappearing on Brexit Day, but the rest would continue, avoiding legal vacuums emerging and giving time for reflection and work in identifying what parts of EU-inspired law the UK wants to keep and what it wants to change or lose.

Two more structural points deserve to be made. The first is that where law has EU origins, either directly or indirectly, UK courts are currently bound, to interpret it in the light of the EU provisions and the case-law of the Court of Justice of the European Union.¹⁵ This has led to the courts producing interpretations which stretch the words of a provision in a direction and to an extent which would not be the case if a purely domestic approach had been taken. In relation to EU-inspired measures surviving Brexit, unless the Brexit legislation takes an extreme approach and prohibits all reference to EU sources, it will still be possible to refer to the EU context but this would merely be one strand, no longer the decisive one, in the task of interpretation. There is also the question of whether existing interpretations, reached by UK courts but based on EU material, could be re-visited to take

⁹ Eg Environmental Permitting (England and Wales) Regulations 2010, SI 2010/675, reg.2.

¹⁰ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/30.

¹¹ S. Hendry, *Frameworks for Water Law Reform* (Cambridge University Press, 2015) 15-18.

¹² Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L327/1.

¹³ Eg the substance of the legal controls on the import and export of endangered species is wholly contained in EU Regulations (Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L61/1), with the UK legislation limited to providing some enforcement measures (Control of Trade in Endangered Species (Enforcement) Regulations 1997, SI 1997/1372), so that the loss of the EU rules would leave the UK with no law to satisfy its obligations as a party to the Convention on the International Trade in Endangered Species.

¹⁴ Government of Ireland Act 1920, s.61.

¹⁵ European Communities Act 1972, s.3(1).

account of the withdrawal, focusing attention on the statutory provisions themselves and their narrower UK context without the answer being dictated by the wider EU background. For example, if the definition of ‘waste’ currently found in EU legislation were to be continued after Brexit, would it be possible to go back several steps and develop a distinctly British interpretation of it, based on the statutory words alone and British rules of interpretation, setting aside the attempts of the UK courts over the years to make sense of and apply the Delphic comments of the European Court?¹⁶

The second is to note that the European Communities Act 1972 confers on Ministers a very broad power to make laws,¹⁷ which has been very heavily used in a wide range of areas.¹⁸ In most cases there will be overlapping powers within the specific domestic statutory regimes. Nevertheless, the existence of such broad law-making powers has meant that in areas where the major policy and legal initiative lies in the hands of the EU, there has been no need to ensure that the terms of the most likely alternative domestic parent Acts actually confer specific power to do everything that might be required. In the absence of the catch-all provision under the 1972 Act, unfortunate lacunae might be found, inhibiting the government’s power to act in a range of circumstances.

Devolution and International Obligations

Two further major structural issues need to be mentioned before the substance of the law is considered, one inward looking one, devolution, and one considering the UK’s relations with the wider world. The devolution settlements enacted in 1998¹⁹ created legislative and executive bodies in Scotland, Wales and Northern Ireland. The precise extent of their powers varies, but generally extends to most environmental matters and an indirect but significant role of EU law has been to dampen the consequences of this diffusion of power. There were differences between each country even before the current devolution structures were introduced, but these have become more pronounced since. Yet the facts that EU law accounts for so much of the law on environmental matters and that all jurisdictions are bound to operate within the framework set by EU law have meant that the capacity for each country to head off in its own direction has been limited. This limitation is not just a feature of EU membership but is built into the devolution settlements, which prohibit the devolved administrations from acting in a way incompatible with EU law.²⁰ For example, no country can decide to set its own water quality standards or to abolish controls on pesticides or to introduce far-reaching restrictions on diesel engines without falling foul of EU law and thus not only risking infringement proceedings from Europe but also, in the case of the devolved authorities, exceeding their legal powers. There is room for national differences to emerge, but within limits.

¹⁶ See the comments of Carnwath LJ in *R (OSS Group Ltd) v Environment Agency* [2007] EWCA Civ 611, [2007] 3 CMLR 30, [2008] Env LR 8, [69].

¹⁷ Legislation can be made ‘for the purpose of implementing any EU obligation ... , or enabling any such obligation to be implemented, or of enabling any rights enjoyed ... by virtue of the Treaties to be exercised’ or ‘for the purpose of dealing with matters arising out of or related to any such obligation or rights’; European Communities Act 1972, s.2(2).

¹⁸ It also allows legislation to be made for the whole UK, overriding (with agreement in practice) the division of responsibility embodied in the devolution settlements, eg Scotland Act 1998, s.57.

¹⁹ Scotland Act 1998, Government of Wales Act 1998 and Northern Ireland Act 1998, all subsequently subject to considerable amendment, extending devolved powers.

²⁰ Eg Scotland Act 1998, s.29(2)(d).

With Brexit, control over environmental law will return to the UK but on most matters not just to London but to the devolved administrations. Each of these could develop radically different environmental laws, although there must be doubts over the capacity of all the administrations in a continuing age of austerity to take over responsibility for all the work currently undertaken through the EU to develop and maintain the law across all the sectors where EU law operates. Providing the room for difference is, of course, one of the purposes of devolution in the first place, but there are consequences if the result is a fragmentation of the law. The need to keep within the EU framework has imposed limits on divergence so far, but without this constraint fragmentation may be seen as a danger and there may be a call for new mechanisms to assist each country in addressing the levels of co-ordination or differentiation appropriate for particular issues.

In leaving the EU the UK will lose many restrictions on its freedom to make its own environmental law, but it will not be free from all constraints. The UK will continue to be bound by many international treaties.²¹ Obligations in relation to air pollution, nature conservation, chemical safety and many other areas will continue,²² as will the obligations to provide access to information, public participation and access to justice under the Aarhus Convention. The big difference, of course, is that whereas EU law is very detailed, the EU structures provide strong (if slow) measures to enforce compliance by states, and domestic courts ensure that individuals can enjoy the rights conferred by EU law, the same does not apply for international law.

New obligations are also inevitable. At present we have no idea what shape it will take, but the withdrawal agreement will create a new legal relationship with the EU, including more or less access to the Single Market and with that more or less freedom to set standards on environmental and other grounds. The close links within the European Economic Area require the application of most EU standards²³ but it is worth noting that even the looser trade agreements between the EU and other states, such as the Ukraine or Canada, include provisions seeking high levels of environmental standards, the application of the precautionary principle and a commitment not to relax environmental laws in order to attract trade or investment.²⁴

Substantive Impact

The substantive impact on environmental law of the UK's membership of the EU, and of its withdrawal, are difficult to assess, although clearly very significant.²⁵ Looking backwards,

²¹ One complication is that for treaties where the UK is currently bound because of the signature by the EU in areas of its exclusive competence the UK will have to become a party in its own right (subject to any negotiations with the EU and the other parties).

²² At present it is often overlooked that what are seen primarily as EU measures may in fact be required under wider international agreements.

²³ The Common Agriculture and Fisheries Policies do not apply to European Economic Area members, but those were hardly major issues in the referendum debate.

²⁴ Eg Association Agreement between the EU and Ukraine, [2014] OJ L 161/3, arts 290, 292, 296.

²⁵ For detailed examinations of this see House of Commons Environmental Audit Committee, *EU and UK Environmental Policy*, Third Report of Session 2015–16 (2015-16 HC 537); Burns et al, *The EU Referendum and the UK Environment: An Expert Review* available at <http://environmenteuref.blogspot.co.uk/p/the-report.html>; Institute for European Environmental Policy, *The potential policy and environmental consequences for the UK of a departure from the European Union* available at http://www.ieep.eu/assets/2000/IEEP_Brexit_2016.pdf

there can be no doubt that the UK's environmental law today is very different from what it was when the EU was joined in 1973. Innovations introduced into the law through the EU include environmental assessment, access to environmental information and bathing water standards, whilst the requirements of the Water and Waste Framework Directives have dominated the law in those areas and the Birds and Habitats Directives have established clear obligations not just to take into account but actually to achieve the conservation of biodiversity. There is no doubt that the UK's law would have changed markedly since the 1970s without involvement with the EU, but also that: "The UK's membership of the EU has ensured environmental action was taken on a faster timetable and more thoroughly than would otherwise have been the case."²⁶ As one example, although some investment in this area would have been likely, it is hard to envisage that the UK would have spent as much money as quickly on the very costly up-grading of sewage treatment systems across the country were it not for the obligation to meet the Urban Waste Water and Bathing Water Directives.

The transformation of the law is not just about the introduction of measures such as those mentioned above which had no place in the UK's law in the early 1970s. There are very significant aspects of the nature of the law itself. The first of these is the stability of EU law. It may take a frustratingly long time for laws to emerge from the EU, and then to be implemented by all the Member States, but once made they stick around. They are not as vulnerable to the short-term pressures of national politics as domestic legislation. The difficulty of revision can mean that desirable improvements are not made, but the fact that the laws are not subject to constant chopping and changing has its advantages. In particular the stability of EU law is well-suited to tackling major environmental problems such as water quality and climate change where long-term programmes and investments are needed to achieve substantial results. The setting of targets for several years in the future and the stability of environmental standards enables industry and investors to plan ahead and allows for the integration of different policy areas to be developed. The greater scope for rapid change that would follow Brexit²⁷ brings both the advantages and disadvantages of flexibility, with the potential to respond more quickly to changing circumstances but also a lack of certainty as to the future.²⁸

A second feature of EU environmental law is the use of strict standards and the imposition of targets. The older domestic law in the UK tended to favour broad statements of purposes or functions supported by largely discretionary powers, leaving it to the executive body concerned (the Minister, local authority or agency) to determine for itself the outcome that should result once all relevant considerations have been duly taken into account. Fixed quality standards are now an accepted part of UK environmental law, but, especially in view of the de-regulatory rhetoric of some in the 'Leave campaign',²⁹ it is possible that some discretion might return, allowing some room for manoeuvre when meeting the legal standards or targets seems particularly difficult, expensive or disproportionate or conflicts with other policy goals. Thus in an area such as nature conservation, there may not be a wholesale dismantling of the EU laws which give protection to designated species and habitats, but there might be a desire to relax the near

²⁶ Environmental Audit Committee (n 25) 3, 10.

²⁷ With the added factor that each of the devolved administrations will be responsible for the law in their own country, subject to their own pressures on the legislative timetable, even where there are no differences in substance.

²⁸ Environmental Audit Committee (n 25) 15-16.

²⁹ Those arguing in the pre-referendum campaigning for the UK to leave the EU.

absolute nature of the obligations set, so that conservation arguments can be overridden and development which has an adverse effect on a Special Area of Conservation or on a protected species can be permitted in circumstances well beyond the tightly confined derogations built in to the EU laws.³⁰

A third point, and one that may be the most important, is that EU law provides a means of calling the government to account. Once environmental obligations have been accepted, the Member States must abide by them. Even when they become costly to implement, difficult to achieve or obstruct what have emerged as more important current priorities, the law and the environmental goals it embodies must be followed. Where it is argued that a State is falling short of its obligations under EU law there are means (slow and imperfect though they are) for using the Court of Justice to seek compliance.³¹ Moreover, the UK courts themselves are in a position to insist that the authorities keep to the long-term promises embodied in EU law, such as in the recent litigation over air quality targets.³²

In the absence of the EU dimension, however, there are much more challenging questions over how the government can be held to account over its environmental commitments. As noted above, there may be similar commitments undertaken as a matter of international law, but these tend not to be so ‘hard-edged’ in their definition and therefore would be harder to enforce in particular instances, even if there were an effective mechanism for securing compliance at the international level. Some such mechanisms do exist, such as the Compliance Committee under the Aarhus Convention, but its decisions lack the full force of law enjoyed by decisions of the Court of Justice so that even if an authority’s actions were held to have breached the Convention that does not mean that it was acting unlawfully as a matter of domestic law. There are also fewer opportunities for individuals and groups to take the initiative in the international sphere, as opposed to the potential for complaints to the Commission or litigation where EU law confers rights.

The accountability provided through EU law has meant that the courts have not had to explore the extent to which general environmental duties and goals in UK laws can be used as fetters on governmental discretion when it is being exercised to the detriment of the stated objectives. At what point would it be possible to say that allowing development affecting sites of value to nature was a contravention of the duty ‘in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions’³³ or, where water is affected, that there is a breach of the duty to ‘exercise any power ... to further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest’?³⁴ The debates and uncertainty about the status and enforceability of the much more specific and legally binding greenhouse gas reduction targets in the Climate Change

³⁰ The steady stream of cases coming before the Court of Justice of the EU shows how often Member States are giving priority to other concerns over the conservation of biodiversity, despite the Court’s constant reminders of the obligations they have accepted; eg *Sweetman v An Bord Pleaná* (C-258/11), *Commission v Greece* (C-600/12), *Commission v Bulgaria* (C-141/14).

³¹ M. Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2nd ed, 2015, Routledge).

³² *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28; this is an obvious area where even if air quality targets are maintained following Brexit, greater leeway might be introduced over how quickly and how far they have to be satisfied.

³³ Nature Conservation (Scotland) Act 2004, s.1.

³⁴ Water Industry Act 1991, s.3(2).

Acts show the difficulties in calling governments to account within the domestic legal structures.³⁵

Conclusion

Once it has withdrawn from the EU, the UK will be able to make a choice over what it does with the law inherited from the EU. That will not be a completely free choice, given the constraints imposed by commitments already existing in international law and those entered into in settling the new relationship between the UK and its neighbours (including the extent of access to the Single Market). Most of the major elements in the UK's environmental law have EU origins, from environmental impact assessment through the definition of waste to air and water quality standards. The UK - or rather in view of the devolution settlements, the devolved administrations - will have the choice whether or not to continue such measures, with or without adjustment. It would seem pointless to dismantle the framework of environmental law simply because of its EU origins and there is no reason to expect a sudden and fundamental change in most areas. Nevertheless, the deregulatory tone of much of the current UK government's rhetoric (and even more of the Leave campaign) might suggest that the new flexibility is likely to be used to reduce the extent to which environmental protection is pursued when it conflicts with other policy goals; air quality targets inherited from the EU are not likely to be seen as an insuperable obstacle to airport expansion around London. The new freedom of action would equally allow for a radical strengthening of environmental protection on some issues (possibly animal welfare where the UK has been at the forefront of pushing for higher standards), but that seems less likely.

For environmental law overall, the most significant changes are likely to be not so much in the details of any legislation, but the new vulnerability of environmental rules to short-term political pressures and the removal of the means by which the government can be called to account. Whatever its flaws, the EU has provided a stable framework of environmental law and the means to ensure that governments and others live up to their obligations. The post-Brexit world will be more volatile. At the time of writing there is no clarity about when the formal negotiations for withdrawal will begin, far less be completed, nor over the tone and content of those negotiations. In particular we do not know the future relationship with the EU and the Single Market, and what that will mean for the need to continue to comply with EU standards on environmental and many other matters. Nor do we know how far there will be a willingness to allow the existing laws based on EU measures to survive unchanged, or conversely a desire (and capacity) to embark on major revisions. Teaching environmental law in the UK is not likely to be dull over the coming years!

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³⁵ Colin T Reid, 'A New Form of Duty? The Significance of 'Outcome' Duties in the Climate Change and Child Poverty Acts' [2012] Public Law 749.